Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CAROLYN KENNEDY,

Petitioner,

v.

DRESSER RAND,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Carolyn Kennedy was a long time employee of Dresser Rand in good standing. In 1995 she suffered from clinically diagnosed depression and insomnia. Her Psychiatrist, a Psychologist and a Certified Social Worker all agreed that her current supervisor, Dennis Emo was the trigger to her depression and that an accommodation was needed changing her supervisor.

An independent efficiency expert, hired by Dresser Rand, recommended that Carolyn Kennedy indeed report to someone different. Dennis Emo also recommended that she report to someone else, and the President of Dresser Rand conceded that it was possible.

Dresser Rand refused to discuss the requested accommodation or make any offer of any accommodation to Carolyn Kennedy. Dresser Rand refused to engage in any interactive process whatsoever.

The lower courts held that the requested accommodation was unreasonable under the Americans With Disabilities Act.

1. Should the Americans With Disabilities Act (ADA) be interpreted in such a way that an accommodation that carries no burden, no expense and may even be beneficial to the employer can be considered unreasonable?

2. Should an employer be absolutely excused from discussing a requested accommodation or entering into an interactive process with employees for the purpose of

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securing possible accommodations under the Americans With Disabilities Act?

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PETITION FOR WRIT OF CERTIORARI

Carolyn Kennedy respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 22, 1999 in order to restore effectiveness to the Americans With Disabilities Act on behalf of Mrs. Kennedy and countless other disabled American workers.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit that gives rise to this petition is attached hereto in Appendix A ("App. A").

JURISDICTION

On September 22, the United States Court of Appeals for the Second Circuit affirmed the judgment of the United States District Court for the Western District of New York. Said judgment is attached hereto as Appendix A-2. That judgment was timely appealed to the United States Court of Appeals for the Second Circuit. This petition has been timely filed within 90 days of the entry of that appellate decision.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The Statutes involved in this case are the Americans With Disabilities Act, ("ADA"), 42 U.S.C. §§ 12101, et seq, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

STATEMENT OF THE CASE

The petitioner was employed by the respondent company from 1980 until 1995. During that time, the petitioner's job performance was rated "commendable" for 10 years, "Satisfactory" for four years, and "fair" for three years by the respondent. In 1995, the petitioner was diagnosed with depression, insomnia and posttraumatic stress disorder. Through psychological treatment and analysis it was determined that conflict with her direct supervisor, Dennis Emo, was the trigger and stressor to her depression.

Petitioner requested accommodation for her disability. The accommodation requested was that she be relieved from reporting to, associating with or otherwise being subjected to the antics of Mr. Emo. Other accommodations may also have been required but no discussion would be had by the respondent. Respondent flat out refused to engage in any interactive process or negotiations.

Petitioner's request for accommodations was summarily refused by the respondent. The accommodations that petitioner requested were, in essence, recommended

by the respondent's paid efficiency experts, "Working Solutions". Petitioner's supervisor, Emo, recommended accommodations to the respondent company that would have complied with petitioner's request. Regardless, respondent refused any accommodation to petitioner and refused to engage in any interactive negotiations relative thereto.

Petitioner sued under the Americans with Disabilities Act and the Rehabilitation Act on December 1996. Respondent answered on February 14, 1997. A motion for summary judgment was filed on August 10, 1998 by the respondent. Petitioner responded on September 1, 1998. Respondent replied.

The Circuit Court by Hon. Charles J. Siragusa issued a decision and order granting respondent's motion.

The Decision: The Court below held that "For purposes of this motion, the Court will assume that the petitioner's depression and insomnia constitute physical or mental impairments under the Americans with Disabilities Act and the Rehabilitation Act. Assuming for the purposes of this motion, that the petitioner is a qualified person with a disability, the Court nonetheless finds her argument regarding the requested accommodation to be without merit." As such, the lower Court left but one issue for the sake of this appeal, and that is whether the accommodation requested was reasonable within the meaning and intent of the law.

REASONS FOR GRANTING THE WRIT

I. If the decision of the Second Circuit is allowed to stand, employers will rely on the *Kennedy v. Dresser Rand* decision to refuse accommodations even if there is no cost or burden associated with the requested accommodation. On this issue, *Kennedy v. Dresser Rand*, ___ F.3d ___ (1999) is in direct conflict *Vande Zande v. State of Wisconsin Dept. of Admin.*, 44 F.3d 538 (7th Cir. 1995), (holding that when determining whether an accommodation is reasonable the court should employ a cost benefit analysis).

II. If the decision of the Second Circuit is allowed to remain, employers will cite *Kennedy v. Dresser Rand* as authority that excuses them from engaging in any two-way discussions or interactive process over possible accommodations.

This is in direct conflict with the First Circuit cases, *Jacques v. Clean-Up Group, Inc.*, 96 F.2d 506 (1996) (holding employers must engage in an interactive process to determine a reasonable accommodation for employees), and *Ralph v. Lucent Technologies*, 135 F.3d 166 (1998), (holding employers have a continuing duty to engage in an interactive process with employees regarding reasonable accommodations negotiations); the Third Circuit's decision in *Taylor v. Phoenixville School District*, 174 F.3d 142 (1999) (requiring an interactive process with initiative taken by the employer), *Mengine v. Runyon*, 114 F.3d 415 (1997), (imposing a duty on employers act in good faith and to aid employees in finding reasonable accommodations); the Seventh Circuit decisions in *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 650, 5 AD Cases 1283 (1996), (requiring an interactive process with initiative taken by the employer), *Feliberty v. Kemper Corp.*, 98 F.3d

274 (1996), (holding that employers have a duty to aid employees in discovering possible reasonable accommodations even where the employee is a medical doctor), *Bultemeyer v. Ft. Wayne Community Schools*, 100 F.3d 1281 (1996), (holding employers have a good faith duty to engage in an interactive process); the Ninth Circuit case, *Buckingham v. United States*, 998 F.2d 735 (1993), (holding that the transfer of an employee is a reasonable accommodation under the ADA and that employers must not interfere with employees' efforts to pursue a normal life); the Tenth Circuit cases, *Roberts v. Progressive Ind.*, 183 F.3d 1215 (1999), (holding as a reasonable accommodation a business trip to Miami accompanied by a private nurse), *Smith v. Midland Brake Inc.*, 180 F.3d 1154 (1999), (holding as a reasonable accommodation reassignment and requiring employers to engage in an interactive process).

POINT I

The Americans With Disabilities Act endeavors to create an avenue of relief for qualified disabled employees by requiring employers to provide such employees reasonable accommodations. However, the Circuit Courts differ as to what is a reasonable accommodation. The Second Circuit in the *Kennedy* decision held that changing an employee's supervisor and preventing that supervisor from further mistreatment of that employee was not a reasonable accommodation under the ADA. The Second Circuit so held despite that the employer's own paid efficiency experts, "Working Solutions," recommendation that such a request would benefit both employee and employer. *Kennedy v. Dresser Rand.*

This decision undermines the very foundation upon which the ADA was enacted.

The Seventh Circuit, in *Vande Zande v. State of Wisconsin Dept. of Ad.*, 44 F.3d 538 (1995), employed a cost benefit analysis while determining whether providing a desktop computer and allowing an employee to work full time from her home qualified as a reasonable accommodation. The court referred to Judge Learned Hand's famous B<PL formula for negligence. *Vande Zande*, 44 F.3d 538. Simply put, an accommodation should be deemed reasonable when the cost to the employer to provide the accommodation is proportionate to the benefits enjoyed by the employee. *id.* This is a sense-based analysis. *id.* When the costs are disproportionately high the accommodation is not reasonable for purposes of the ADA. *id.* However, where the costs of accommodation to the employer are minimal and the benefits to the employee are great the accommodation must be deemed reasonable. *Vande Zande*, 44 F.3d 538. Indeed, the Court in *Kennedy*, concedes that such an analysis applies and yet applied it erroneously.

When the costs of a requested accommodation are not greater than the burden to the company, the accommodation must be deemed reasonable. In *Criado v. IBM Corp.*, 96 F.2d 506 (1st Cir. 1996) the Court balanced the costs of allowing Criado to take paid medical leave as an accommodation for depression against the benefits to Criado. The Court properly concluded that such an accommodation was a reasonable one because it did not financially burden IBM since it would be more costly to hire and train new employees. *id.*

Similarly, in *Roberts v. Progressive IND.*, 183 F.3d 1215 (10th Cir. 1999), the petitioner employee requested that the respondent employer pay for his personal care attendant (PCA) to accompany him on a two-day business trip. The employer refused to provide such care and instead offered to provide only four hours of PCA care when the employee reached his destination. *Id.* The case went to trial and the jury found for the employee. The Tenth Circuit Court of Appeals balanced the costs and benefits and properly found that this was a reasonable accommodation. The Court held that the employer had a duty to reasonably accommodate the employee and had failed to do so. *id.*

Finally, in *Arneson v. Heckler*, 872 F.2d 393 (8th Cir. 1989), the Eighth Circuit Court of Appeals held that the employer was not entitled to summary judgment because there existed triable issues of material fact as to the reasonableness of certain requests by the employee. The employee in this case requested a telephone headset, a quieter office, transfer to a different office location, and/or an assistant. *id.* The lower court granted summary judgment in favor of the employer on the grounds that these were not reasonable accommodations as a matter of law. The Circuit Court, however, held that these requests for accommodations were not unreasonable as a matter of law. *id.* The court further held that the question of reasonableness was not disposable as a matter of law and thus reversed and remanded on the issue of reasonable accommodation. *id.*

Unlike the forgoing cases, the Second Circuit Court of Appeals in the *Kennedy* case erroneously affirmed summary judgment for the respondent where there existed

issues of material fact as to the reasonableness of Kennedy's requested accommodations. Here, the cost or burden to the respondent was de minis. In fact, Kennedy showed that the respondent's very own paid efficiency experts, "Working Solutions," recommended that petitioner not report to Emo. Working Solutions' report stated that Kennedy could simply report to the Human Resource Manager instead. Kennedy further demonstrated, that Emo himself recommended that Kennedy no longer maintain contact with him. Working Solutions predicted a change in supervisor for petitioner would benefit respondent company as well as employee. Accordingly, the cost to the respondent would have amounted to nothing and the benefit to the employee and the company would have been great. Under these circumstances the cost benefit analysis clearly mandates that such an accommodation be deemed reasonable and ordered. At a minimum, the evidence was clearly sufficient to preclude summary judgment. Instead, the Second Circuit failed to weigh the costs against the benefits of the requested accommodation. The Second Circuit summarily ignored the benefits to the company and employee, and that the efficiency experts recommended the accommodation. The Second Circuit held that under petitioner's circumstances a change in supervisor was not reasonable. The analysis employed by the Second Circuit is in direct conflict with the logic applied in *Vande Zande*. The Second Circuit erroneously affirmed summary judgment. Accordingly, the Court should grant Writ of Certiorari to clarify the state of the law regarding Reasonable Accommodations under the ADA.

POINT II

The *Kennedy* decision allows respondent employers to sit back passively and knock down every accommodation requested by employees as too burdensome without engaging in an interactive process to determine what would be reasonable. The Third Circuit, however, stated that there must be an "interactive process" between the employer and the employee. Further, the *Taylor* Court noted, "the interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. That's not the proactive process intended: it does not help avoid litigation by bringing the parties to a negotiated settlement." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 316 (3d Cir. 1999). However, that is exactly what happened in Mrs. Kennedy's case.

The *Taylor* Court noted that employers can show good faith in the interactive process by "taking steps like the following: meet with the employee who requests the accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show sign of having considered employee's request, and offer and discuss available alternative when the request is too burdensome."

In the Seventh Circuit, the law is that, "once an employer's responsibility is triggered, the employer must engage with the employee in an 'interactive process' to

determine the appropriate accommodation under the circumstances." *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 5 AD Cases 1283 (7th Cir. 1996).

The EEOC Guidance states:

> "Is an employer required to provide the reasonable accommodation **that the individual wants?**
>
> The employer may choose among reasonable accommodations as long as the chosen accommodation is effective. Thus as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability" *The U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, para 8.*

The purpose of the Americans With Disabilities Act is, "(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities . . . " 42 U.S.C § 12101(b). The *Kennedy* decision contravenes each and every purpose and foundation of Reasonable Accommodation under the Americans With Disabilities Act. With this decision, there can be no "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). As

a result, the *Kennedy* decision creates a conflict among the Circuits requiring clarification.

Dresser Rand blatantly refused to discuss any accommodation for the Petitioner. Indeed, the respondent merely sat back and knocked down every request for accommodation as too burdensome without more. Yet in the majority of the circuits, the respondent bears the responsibility and duty to engage in an interactive process. *Jacques v. Clean-Up Group, Inc.*, 96 F.2d 506 (1st Cir. 1996), *Ralph v. Lucent Technologies*, 135 F.3d 166 (1st Cir. 1998), *Taylor v. Phoenixville School District*, 174 F.3d 142 (3rd Cir. 1999), *Mengine v. Runyon*, 114 F.3d 415 (3rd Cir. 1997), *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 650, 5 AD Cases 1283 (7th Cir. 1996), *Feliberty v. Kemper Corp.*, 98 F.3d 274 (7th Cir. 1996), *Bultemeyer v. Ft. Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996), *Buckingham v. United States*, 998 F.2d 735 (9th Cir. 1993), *Roberts v. Progressive Ind.*, 183 F.3d 1215 (10th Cir. 1999), *Smith v. Midland Brake Inc.*, 180 F.3d 1154 (10th Cir. 1999). The respondent refused to engage in any good faith interactive process. All requests for meetings regarding accommodations for petitioner were summarily denied. All good faith attempts by petitioner were met with respondent's bad faith refusal to cooperate or engage in any interactive process. As such, respondent breached its duty to act in good faith to negotiate with petitioner and no resolution was made.

The purposes of the ADA were thrown aside and respondent enjoyed immunity from the good faith requirements of the ADA by means of the Second Circuit's upholding the dismissal of petitioner's requests for

accommodations. The *Kennedy* decision ignores the foundation of the ADA and renders it a dull and nearly useless tool of employee remedy. If the *Kennedy* decision stands, employers in the Second Circuit will remain shielded from any duty to act in good faith and engage in interactive processes with employees to remedy accommodation issues. This certainly undermines the ADA to the point where it provides no relief for aggrieved employees. Moreover, such a decision runs afoul of the EEOC Guidelines and established case law requiring employers to act in good faith and engage in some meaningful interactive process with the disabled employee. *Jacques v. Clean-Up Group, Inc.*, 96 F.2d 506 (1st Cir. 1996), *Ralph v. Lucent Technologies*, 135 F.3d 166 (1st Cir. 1998), *Taylor v. Phoenixville School District*, 174 F.3d 142 (3rd Cir. 1999), *Mengine v. Runyon*, 114 F.3d 415 (3rd Cir. 1997), *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 650, 5 AD Cases 1283 (7th Cir. 1996), *Feliberty v. Kemper Corp.*, 98 F.3d 274 (7th Cir. 1996), *Bultemeyer v. Ft. Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996), *Buckingham v. United States*, 998 F.2d 735 (9th Cir. 1993), *Roberts v. Progressive Ind.*, 183 F.3d 1215 (10th Cir. 1999), *Smith v. Midland Brake Inc.*, 180 F.3d 1154 (10th Cir. 1999).

The *Kennedy* decision affronts the trend of the aforementioned decisions in construing the requirements of the ADA by allowing employers in the Second Circuit to escape good faith and interactive process duties. Nearly all the Circuits impose upon the employer a good faith duty to engage in an interactive process with employees. The *Kennedy* decision conflicts with the law of those Circuits thus frustrating Congress's intent, "to provide

clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). The *Kennedy* decision renders uncertain the state of the law interpreting employer's duties to engage in an interactive process. This issue is ripe for the United States Supreme Court to Grant Writ of Certiorari.

CONCLUSION

Kennedy was a loyal employee to the respondent for fifteen years until she fell ill with depression, insomnia, and posttraumatic stress disorder. The cause of her depression was extreme mistreatment by her supervisor, Dennis Emo. As such, Kennedy requested a simple and reasonable accommodation. Namely that she could report to a different supervisor and avoid all further contact with Emo. In fact Emo himself recommended the same accommodation. The respondent's own hired efficiency experts reported that such an accommodation was not only possible, but would benefit respondent as well as Kennedy. Nonetheless, respondent summarily refused the accommodation. Moreover, respondent refused to engage in the legally required interactive process to assist Kennedy in finding any possible alternative reasonable accommodations.

The law is clear. Under these circumstances, respondent owed a duty to provide the requested reasonable accommodation. The *Kennedy* decision essentially usurps the purposes of the ADA by denying employees any relief where there is no cost to the respondent employer

in providing a reasonable accommodation. Additionally, the decision grants summary judgment where there exists material questions of fact as to the reasonableness of an accommodation. The evidence presented by Kennedy was clearly sufficient to at least raise a question of fact precluding summary judgment. Finally, the *Kennedy* decision further confuses the state of the law with regards to the employer's duty to engage in an interactive process. The majority of circuits impose a good faith duty to engage in an interactive process on employers. The Second Circuit Court of Appeals, however, vitiates any such duty and instead shields employers from any good faith requirements. If the *Kennedy* decisions is allowed to stand, employers will cite it as an authority allowing them to sit back passively and knock down every accommodation requested by employees as too burdensome without engaging in an interactive process to determine what would be reasonable. As such, *Kennedy* decision undermines the very foundations upon which the ADA was enacted and creates several conflicts among the Circuit Courts. Therefore, the Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: September 13, 1999 Decided: September 22, 1999)

Docket No. 98-9629

CAROLYN M. KENNEDY,
Plaintiff-Appellant,

v.

DRESSER RAND CO.,
Defendant-Appellee.

Before: VAN GRAAFEILAND, CALABRESI and SACK, *Circuit Judges.*

Appeal from an order of the Western District of New York (Siragusa, *J.*) granting defendant's motion for summary judgment. Plaintiff-appellant brought a claim under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The district court held that the defendant-appellees were entitled to summary judgment because the plaintiff-apellant's proposed accommodation was unreasonable as a matter of law.

Affirmed.

LUCIANO L. LAMA, Ithaca, N.Y., *for Plaintiff-Appellant.*

EUGUENE D. ULTERINO, Nixon, Hargrave, Devans & Dolye LLP, Rochester, N.Y. (Stanley J. Matusz, of counsel), *for Defendant-Appellee.*

PER CURIAM:

Plaintiff-Appellant Carolyn M. Kennedy appeals from an order of the district court for the Western District of New York (Siragusa, *J.*), granting the motion of defendant-appellee Dresser Rand Co. ("Dresser") for summary judgment. Kennedy brought her claims under the ADA and Rehabilitation Act, alleging that she suffered from "depression" and that her supervisor at Dresser, Dennis Emo, was the "trigger and stressor to her depression." In order to establish a prima facie case under the ADA and Rehabilitation Act, a plaintiff must show that, "with reasonable accommodation," she could perform the essential functions of the job. *See Stone v. City of Mount Vernon*, 118 F.3d 92, 96-97 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1044 (1998). Prior to leaving Dresser, Kennedy requested that "she no longer work for, report to, associate with, or be influenced by her assigned supervisor . . . and that Dresser Rand Company eliminate any personal contact between plaintiff and [her supervisor]." The only issue we consider in this case is whether Kennedy's requested accommodation was a reasonable one. We conclude that it was not.

I. BACKGROUND

The following facts are uncontested by the parties. In 1978, Kennedy began working at Dresser as a part-time nurse. In 1979, she became a full-time nurse, and between 1979 and 1995, Kennedy worked for Dresser and was supervised, either directly or indirectly, by Dennis Emo, who oversaw all of Dresser's health care personnel. In 1992, Kennedy was assigned responsibility for Dresser's

workers' compensation claims. This job required her to work closely with Emo, who was considered to be the "workers compensation expert at the plant."

Between 1985 and 1995, Kennedy became convinced that she was being harassed by Emo. This harrasment took the form of critical evaluations and criticism of Kennedy's attitude. Kennedy also alleges that Emo "taunted me, sneered at me, [and] spoke to me in sarcastic and insulting tones constantly." On December 20, 1995, Kennedy notified Dresser that she had been diagnosed with depression. The letter stated that her depression resulted from "continuous, unrelenting mistreatment and unnecessary harassment" by Emo. Moreover, it demanded that Kennedy "be relieved from reporting to, associating with, or otherwise being subjected to the antics of Mr. Emo." The letter mentions "additional accommodations" that "may be required," but there is no evidence of any other requests for accommodation by Kennedy or of any modification of her request that she be relieved of any contact with Emo.

When Dresser failed to meet Kennedy's demand for accommodation, she left work and ultimately brought this action. After the close of discovery, Dresser moved for summary judgment. The district court granted Dresser's motion, concluding that "[b]ecause the plaintiff has failed to demonstrate that her requested accommodation is reasonable, she has failed to establish a prima facie case" of discrimination. Arguing that the accommodation she requested was reasonable, Kennedy appeals the district court's grant of summary judgment.

II. DISCUSSION

We review a district court's grant of summary judgment *de novo*, drawing all reasonable factual inferences in favor of the nonmoving party. *See McPherson v. Coombe*, 174 F.3d 276, 279-80 (2d Cir – 1999). Summary judgment is only appropriate "if, viewing all evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact." *Buttry v. General Signal Corp.*, 68 F.3d 1488, 1492 (2d Cir. 1995).

In order to establish a prima facie case under the ADA or the Rehabilitation Act, the plaintiff "must show, as part of her burden of persuasion, that an effective accommodation exists that would render her otherwise qualified." *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 139 (2d Cir. 1995). "On the issue of reasonable accommodation, the plaintiff bears only the burden of identifying an accommodation, the costs of which, facially, do not clearly exceed its benefits." *Id.* This burden is not a heavy one. *See id.* Moreover, the question of whether a proposed accommodation is reasonable is "fact-specific" and must be evaluated on "a case-by-case basis." *Wernick v. Federal Reserve Bank*, 91 F.3d 379, 385 (2d Cir. 1996). Nevertheless, district courts may properly grant summary judgment when a plaintiff fails to meet even this light burden. *See id., Borkowski*, 63 F.3d at 139.

In rejecting Kennedy's proposed accommodation, the district court – after assuming *arguendo* that Kennedy's disability qualified her under the ADA and Rehabilitation

Act[1] – cited *Wernick*, 91 F.3d at 384, and stated flatly that "the replacement of a supervisor is not a plausible accommodation." [A430] In so doing, the court appeared to read *Wernick* as establishing a per se rule that the replacement of a supervisor cannot be a reasonable accommodation. The Seventh Circuit, in an ADA case, has apparently adopted such a per se rule against the reasonableness of requests for transfer to a different supervisor. *See Weiler v. Household Fin. Corp.*, 101 F.3d 519, 526 (7th Cir. 1996) ("The ADA does not require HFC to transfer Weiler to work for a supervisor other that Skorupka, or to transfer Skorupka."). Similarly, EEOC guidelines seemingly embrace the notion that a request for a change of supervisor is per se unreasonable. *See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*, 8 Fair Employment Prac. Manual (BNA) 405:7625.

As *Wernick* clearly states, however, in this Circuit, the question of whether a requested accommodation is a reasonable one must be evaluated on a case-by-case basis. *See* 91 F.3d at 385. A per se rule stating that the replacement of a supervisor can never be a reasonable accommodation is therefore inconsistent with our ADA case

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[1] That she qualifies under the statutes, however, are by no means clear. In order to demonstrate that she qualifies as disabled under the ADA and Rehabilitation Act, a person must show that (1) she has a physical or mental impairment and (2) that such impairment substantially limits one or more of her major life activities. *See Wernick*, 91 F.3d at 383. Moreover, "[a]n impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." *Heitweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994).

law. There is a presumption, however, that a request to change supervisors is unreasonable, and the burden of overcoming that presumption (i.e., of demonstrating that, within the particular context of the plaintiff's workplace, the request was reasonable) therefore lies with the plaintiff. *Cf. Borkowski*, 63 F.3d at 139 (stating, even in the absence of a formal presumption, that "the plaintiff must show, as part of her burden of persuasion, that an effective accommodation exists that would render her otherwise qualified").

In this case, Kennedy has not met her burden of identifying an accommodation "the costs of which, facially, do not clearly exceed its benefits." *Id.* First, Kennedy has presented none of the types of facts that would suggest that in her particular workplace, a change of supervisors could be accomplished without excessive organizational costs.[2] Second, Kennedy's request was not

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[2] Kennedy points to several facts that she argues demonstrate that the requested accommodation would not be excessively costly. First, she cites a 1995 report written by outside consultants suggesting that Kennedy's position be reorganized such that she would report directly to the "Human Resource manager." Second, she notes that when asked at his deposition whether Kennedy's reassignment was possible, the president of Dresser stated answered that "[a]nything's possible." The report recommendations concerning Kennedy's job, however, were rejected by the company before this litigation ever began. The reason given for that rejection was that, because Emo was the plant expert on workers' compensation, it was necessary for the employee in charge of workers' compensation claims to report directly to him. We are loathe to tell a company how to structure its workforce. *See Wernick*, 91 F.3d at 384 ("[N]othing in the law leads us to conclude that in enacting the disability acts, Congress intended

simply for reassignment to a different supervisor but also for protection from *any* interaction with Emo. In the context of the particular workplace described in the record before us, it would be virtually impossible for Kennedy to perform her job of coordinating workers' compensation claims without at least some contact with Emo, who supervises all health care personnel and who is the plant "expert" on workers' compensation. Because, on the facts of this case, Kennedy has not met her burden of identifying a reasonable accommodation, the district court did not err in granting Dresser's motion for summary judgment.

* * *

The judgment of the district court is affirmed.

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to interfere with the personnel decisions within an organizational hierarchy."). Even if we were to find that the consultants' report raised a genuine issue of fact as to the costs associated with reassigning Kennedy to a different supervisor, neither the report (nor the company president's statement) could plausibly be construed as evidence of the reasonableness of Kennedy's demand to have no contact whatsoever with Emo.

Similarly, Kennedy argues that an email by Emo listing a series of options for Kennedy's reassignment demonstrates that her request was reasonable. The options listed in Emo's email, however, would either have required Kennedy to move to a completely different job – something she has not requested – or would still have entailed substantial interactions with Emo – thus failing to satisfy her request of no contact with her former supervisor.

UNITED STATES COURT OF APPEALS
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NEW YORK 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 22nd day of September, one thousand nine hundred and ninety-nine.

BEFORE: Hon. Elisworth A. Van Graafeiland
Hon. Guido Calabresi
Hon. Robert D. Sack

Circuit Judges

Docket No. 98-9629

CAROLYN M. KENNEDY,

Plaintiff-Appellant,

-v-

DRESSER RAND CO.,

Defendant-Appellee.

(Filed Sept. 22, 1999)

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the Western District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED,** and **DECREED** that the order of said district court be and it hereby is affirmed in accordance with the opinion of this court.

FOR THE COURT
Karen Greve Milton, Acting Clerk
By:

/s/ Beth J. Meador
Beth J. Meador
Administrative Attorney